Menlo Food Corporation *and* Hotel Employees Restaurant Employees Union Local 19. Cases 32–CA–16384 and 32–RC–4364

December 14, 1999

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On January 8, 1999, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Menlo Food Corporation, East Palo Alto, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(a).

"(a) Within 14 days after service by the Region, post at its East Palo Alto, California facility copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 32, in English and such other languages as the Regional Director determines are necessary to fully communicate with employees, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by other material. In the event that, during the pendancy of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 17, 1997."

IT IS FURTHER ORDERED that the election held in Case 32–RC–4364 is set aside and that case is remanded to the Regional Director for Region 32 to conduct a new election when he deems the circumstance permit the free choice of a bargaining representative.

[Direction of Second Election omitted from publication.]

George Velastegui, *Esq*., for the General Counsel.
Kathryn E. Sears, *Esq*. (*Gibson, Dunn & Crutcher*), of Palo Alto, California, for the Respondent.

DECISION AND REPORT ON OBJECTIONS

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard the above-captioned cases in trial in Oakland and San Quentin, California, in June, July, and August 1998. The matter arose as follows.

I. THE UNFAIR LABOR PRACTICE CASE

On September 29, 1997, Hotel Employees Restaurant Employees Union Local 19 (the Charging Party, the Petitioner, or the Union) filed a charge, docketed as Case 32–CA–16384, with Region 32 of the National Labor Relations Board against Menlo Food Corporation (the Respondent or the Employer) amending that charge on February 9, 1998.

The Regional Director for Region 32 issued a complaint and notice of hearing on the amended charge on February 27, 1998, and an amended consolidated complaint and notice of hearing on April 29, 1998. The Respondent filed timely answers to the complaint and amended complaint.

The complaint as amended alleges and the answer denies that the Respondent's agents made various improper promises and instructions to, threats to, interrogations of and surveilled employees in the period of September 1997 through January 1998, in violation of Section 8(a)(1) of the National Labor Relations Act (the Act). The complaint further alleges and the answer denies that on or about September 19, 1997, the Respondent terminated employees Victor Ruiz and Daniel Castañeda because of their union or other protected concerted activities in violation of Section 8(a)(3) and (1) of the Act.

The complaint alleges and the answer denies that the Union at all relevant times had the support of a majority of employees in the Union, made a demand for recognition and bargaining of the Respondent on or about September 17, 1997, which demand was at all times thereafter refused by the Respondent. The complaint alleges and the answer denies that, as a result of the other alleged unfair labor practices, a new election would not fairly test employees sentiments and that a bargaining order should be directed against the Respondent effective on or before September 17, 1997. The complaint finally alleges and the answer denies that the Respondent's failure, on and after September 17, 1997, to recognize the Union upon its demand for

[1] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that the they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] No exceptions were filed to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(1) by threatening employees with loss of their jobs for supporting the Union, by promising that employees who voted against the Union would receive wage increases, and by impliedly threatening employees with loss of their jobs if they selected the Union in the election.

[3] We shall modify the judge's recommended Order to conform to our recent decision in *Excel Container,* 325 NLRB 17 (1997).

recognition and the bargaining order sought violates Section 8(a)(5) and (1) of the Act.

II. THE REPRESENTATION CASE

On September 24, 1997, the Union filed a petition, docketed as Case 32–RC–4364, seeking to represent the Employer's employees. Pursuant to a Stipulated Election Agreement approved by the Regional Director on October 21, 1997, an election was conducted on November 12, 1997, in the following unit (the unit):

> All full time and regular-time food processing and production employees employed by the Employer at its East Palo Alto, California facility; excluding managerial and administrative employees, sales personnel, office clerical employees, shipping and receiving employees, truck drivers, all other employees, guards and supervisors as defined in the Act.

The tally of ballots shows that 19 votes were cast for the Union, 21 votes cast against the Union, and 3 ballots were challenged. The challenged ballots were sufficient in number to affect the results of the election. On February 26, 1998, the Regional Director approved the parties' stipulation on challenges which recommended the challenge to Jorge Calderon, one of the three challenged ballots, be sustained. In consequence the remaining challenged ballots were no longer determinative of the results of the election.

The Petitioner filed timely objections to the election. On March 2, 1998, the Regional Director issued a Report on Objections, order consolidating cases and notice of hearing. The Report approved the withdrawal of certain objections and found that Objections 2, 3, 6, and 7 raised substantial and material issues of fact which could best be resolved through a hearing. The Report ordered that the hearing on objections be consolidated with the hearing directed on the complaint, as set forth above for a common hearing and determination and, requested that the designated judge prepare and serve upon the parties a report containing resolutions of credibility, findings of fact, and recommendations to the Board respecting the objections.

FINDINGS OF FACT

On the entire record,[1] including helpful briefs from the General Counsel and the Respondent, I make the following findings of fact.[2]

I. JURISDICTION

The Respondent is and at all times material has been a California State corporation with an office and place of business in East Palo Alto, California, where it has been engaged in the business of manufacturing eggroll skins. In the course and conduct of its business, the Respondent annually sells and ships goods and or provides services valued in excess of $50,000 directly to customers located outside the State of California. The complaint alleges, the answer admits, and, based on the above commerce facts, I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

The Union is and has been at all times material a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Background

The Respondent is engaged in the manufacture of eggroll skins, i.e., the flour wrappers on the popular food item. The process involves preparing, shaping, and cooking flour dough on various equipment. In recent times some 40-odd production employees have been engaged in the eggroll skin preparation process.

Lee Mo is the Respondent's owner and president;[3] Stephen Luk is the general manager. These two individuals speak Chinese and English but speak only a little Spanish. The two production supervisors at relevant times were Salvador Jimenez and Jose Garcia. These two individuals speak both English and Spanish but speak very little or no Chinese. All four of these employees are undisputed supervisors and agents of the Respondent. The unit employees at relevant times were Latino, each of whom spoke Spanish but generally spoke little English and essentially no Chinese.

The Union was recognized by the Respondent as representative of its employees in early 1994 and entered into a contract with the Union effective by its terms from April 7, 1994, through April 6, 1996, covering the following unit of employees:

> All production and maintenance employees employed by the Respondent at its plant at 175 Demeter Street, East Palo Alto, California, excluding office and clerical employees, sales personnel, shipping and receiving employees, truck drivers, guards and supervisors.

Union officials dealt with the Respondent's management during the contract on various matters. At the time of the contract's 1996 expiration, recognition of the Union was withdrawn[4] and the Union ceased to represent the employees at least until the disputed events at issue here.

The Union initiated an organizing campaign among the Respondent's employees a little over a year later and, in the 4-month period from late May through early September 1997 obtained the signed authorization cards of some 34 production employees.

On September 17, 1997, the Union faxed a letter to the Respondent, which was received by it in the normal course, asserting the Union represented "a substantial majority" of the Respondent's food process and production employees, that it was prepared to demonstrate its majority, and was seeking negotiations for a collective-bargaining agreement. On the same day, Union Business Representative Enrique Fernandez went to the Respondent's facility and, there joined by a significant majority of employees, who ceased work and chanted slogans of support

[1] Substantial portions of the record testimony and exhibits were in Spanish and were translated into English. Where it is relevant to an understanding of the issues of the case, the facts of translation of particular evidence is noted. Generally, the nonsupervisory employees spoke and were communicated with orally and in writing in Spanish.

[2] As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings here are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

[3] Lee Mo started the Respondent in 1975 as its sole employees. Mo died in 1994.

[4] There is no contention that the withdrawal was in violation of the Act or that the General Counsel's theory of a bargaining obligation herein is predicated on a continuing recognition theory.

for the Union as discussed in greater detail infra, demanded recognition of the Respondent.

On September 24, 1997, the Union filed a representation petition with Region 32 docketed as Case 32–RC–4364. The parties entered into a Stipulation Election Agreement approved by the Regional Director on October 21, 1997, agreeing to hold an election on November 22, 1997, in the following unit (the unit):

> All full time and regular part time food processing and production employees employed by the Respondent at its East Palo Alto, California facility, excluding managerial and administrative employees, sales personnel, office clerical employees, shipping and receiving employees, truck drivers, all other employees, guards and supervisors as defined in the Act.

Following an election campaign during which the Respondent utilized the services of a consulting firm, the election was conducted on November 12, 1997. As set forth supra, the tally of election results indicated a defeat for the Union, but timely objections to the election were filed by the Union.

B. Events

1. September 17, 1997

Substantial testimony was introduced respecting the specifics of the demonstration at the Respondent's facility on September 17, 1997. There is little doubt that many of the employees were expecting the arrival of Union Business Agent Enrique Fernandez and other union officials at the facility. When he arrived, the bulk of the employees evidenced their support for the Union by ceasing work, gathering together in the workplace, shouting prounion slogans, joining with Fernandez as he moved through the facility, talked to the Respondent's agents, and attempted to enter the Respondent's administrative offices. It is also uncontroverted that the Respondent's agents, Luk and Mos, were distracted and discomforted by the process which was noisy and chaotic, and who were also concerned and involved with the effort necessary to insure that the possible damage to production and product in preparation caused by the worker's abandoned equipment be minimized. There is no dispute that the union officials were asked to leave and that, in time, the police were called, arrived on scene, and finally the matter was resolved and the employees returned to work.

Some dispute occurred respecting the extent to which new employees Daniel Castañeda and Victor Ruiz participated, as observed by the Respondent's agents. Castañeda and Ruiz who testified that they supported the Union—as did the other employeesby ceasing work, marching, and shouting. Mo and Luk denied noticing whether either Castañeda and Ruiz were among the employees who supported the Union during the demonstration or learning thereafter that this was so.

Alfredo Gutierrez, an employee of Respondent at the time in question, testified that he did not participate in the demonstration on September 17, but rather was attempting to keep the abandoned equipment operating as well as possible in the absence of the other employees. He testified that while so engaged, and while Mo was attempting to get the employees back in the plant, with the employees all around the area and while he was within 5 or 6 feet of Mo, he heard her assert: "These guys will only work a short time."

Mo testified that, while she did not recall making such a statement in Gutierrez' presence that day, she did recall asserting out loud—but to no one in particular—while observing the demonstrators: "One of these guys only work for short time," or "Some of these guys maybe just work for a short period of time." She testified that the comment was related to her perception that the new employees, who were supporting the Union by ceasing work and demonstrating, had no experience working for the Respondent when the Union had earlier represented employees and hence could not reasonably have confidence in the desirability of union representation at the Respondent.

2. Events following September 17

Juan Pacheco, a current employee of the Respondent, testified[5] that he observed a conversation between Stephen Luk and another employee soon after the Wednesday, September 17, 1997 workstoppage which occurred outside the facility during a break in which Luk said that "they were going to fire Daniel [Castañeda] and Victor [Ruiz] because they went outside with the Union. . . . Steve Luk said that Daniel and Victor should not have done it because they were new employee . . . . And he also said that they were going to fire them on Friday." Luk denied making the statements attributed to him and further asserted that he had no role in these two individual's discharges nor any knowledge of their terminations prior to the day of their discharges, Friday, September 19, 1997.

Alfredo Gutierrez testified that a week or 2 before the election he had two conversations one-on-one with Stephen Luk. In the first, Luk asked him if he had "signed for the union?" and Gutierrez answered that he had rather "signed for the Company." Later the same day and in the same location Luk asked Gutierrez, in Gutierrez' recollection: "How many people would sign for the union" and Gutierrez answered he did not know, to which Luk rejoined: "[W]hoever signed for the union would have problems." Luk testified he had no recollection of this conversation.

Gutierrez further testified that on the day of the election, November 22, 1997, Mo had a conversation with him and fellow employee Miguel Giardo in which she asked him to "check how many people signed for the union" and he agreed. Mo denied making the statements attributed to her.

3. The Respondent's consultant's meetings with employees

The Union filed its representation petition on September 24, 1997. The Respondent retained the services of a labor-consulting firm utilizing one of its agents, Arturo Tovar, in the period proceeding the November 12, 1997 election, to hold meetings with small groups of employees. These meetings were conducted in Spanish and generally involved four to six employees with the particular employees in most groups changing for each meeting as production schedules allowed differing groups of employees to be sent to particular meetings. In essence participating employees attended three separate meetings during the period in which the issues of union representation and related matters were discussed.

Employee Miguel Vital Gomez testified that in the meetings he attended with the same employees on each occasion Tovar told the assembled employees that the Respondent would not sign a contract and that if the Union was successful in representing the employees a strike would occur. He further recalled

[5] As discussed in greater detail, infra, Pacheco's testimony was comprised both of recollection and adoption of earlier sworn statements.

Tovar asked the employees why they wanted a union. Employee Nicholas Martinez recalled in the single meeting he attended that Tovar said: "[I]f the Union won the Owner would not sign a new contract." Martinez further recalled:

> Well, [Tovar] said that if the Union was going to get in, if we were going to sign for the Union, there was a chance that there was going to be a strike. Well, that if we voted for the Union she was going to close down and the ones that had voted for the Union were going to be fired. And that she was going to work with the people that wouldn't have signed. Then that she was going to get new people to replace workers.

Employee Benito Avila Gaspar recalled that Tovar said in his meetings that there would be strikes if the Union won the election. Employee Miguel Angel Gomez testified that Tovar told the employees in his meeting that "the bosses were not going to sign, under any circumstance, a contract with the Union." He also testified that Tovar "was asking which ones were the problems of the Company to see if he was going to be able to do something in order to find a solution."

Employee Ramon Quintero testified in some detail to the first two meetings he attended with Tovar. In the first Quintero testified:

> First, [Tovar] introduced himself. He said he was a labor counselor. I asked him for his name one more time and I asked him for his card. He told me that he didn't use cards. And he said that he had been hired by the Company to talk about the problem. I asked him what was the problem. He told me that the problem was the Union. And he told me he had been hired by the Company to talk about the disadvantages of the Union. He said that if the Union came in there might be a strike. And he said that if there was a strike that we, the employees, might be out a certain door and the Company might, at the same time, be hiring employees through another door and make them into permanent employees. And we would have to get on a waiting list until there was a—an open—a vacancy. He said that the strike might last months or years. He said—he asked us how he would support ourselves during that time. How would we pay rent if when one is on strike one doesn't have any rights—rights to unemployment and disability and no other government benefits.

Quintero recalled that in his second meeting on or about October 29, 1997, with Tovar:

> [Mr. Tovar] started talking about strike again, in different ways. And he asked us why that union—if that union represented hotels and restaurants and they didn't know anything about manufacturing companies. I told him that it was perhaps because it was the only one we knew.
>
> He said, "Why don't you talk to the owner to try to get at the problem? Why use third persons if everything can be taken care of there?" He said, "Vote no, against the Union." He thought that simply—by simply having the threat of the union that would be enough to—for it to have favorable changes for the employees.
>
> And I asked him if this was a promise he was making us. He said, "No." I said, "But this is what you are implying." He said, "Take it as you please."

The Respondent called half a dozen employees who attended meetings with Tovar. These employees, with varying degrees of recollection, generally denied that Tovar had made the assertions alleged in the complaint. Arturo Tovar testified that while he had no separate recollection of each of the many meetings held with employees, he utilized notes and outlines in the meetings to insure he covered the points he desired to make with employees. In essence, he testified that he explained to the employees what was occurring or might occur and generally presented the Respondent's perspective that representation by the Union was not desirable for employees and that employees, being better off without union representation, should vote no in the upcoming election. He testified that he did not make promises, threats, nor otherwise violate the Act. He particularly denied asserting that the Respondent would not negotiate with the Union or sign a contract or that the plant would close to punish employees if they selected the Union.

4. Two pieces of the Respondent's campaign literature

One of the Respondent's handouts to employees distributed on October 24, 1997 meetings asserts:

"If the union gets in, will there be a strike?"

An informed vote is a X NO vote !

The union's only real weapon to force its demands when bargaining breaks down is to strike. Before the election you should ask yourself if you would be willing to strike.

Once a strike is called, All employees are affected.
STRIKERS get no pay, no benefits, no unemployment compensation, and they face the possibility of losing their jobs while permanent replacements are working in their place.

Union workers who want to work can be fined and disciplined by the union.

Those who cross a picket line may face the possibility of harassment or threats.

Will it happen here? We certainly hope it never does - but frankly, we don't know

On November 5, 1997, the Respondent distributed a letter to employees over the signature of Stephen Luk which asserts in part:

> Dear Menlo Food Employees:
>
> A lot has been said by the union about what they can do for you. They have made a lot of promises, but can they deliver on what is really important to you? Can the deliver higher wages or benefits? Can they deliver job security?
>
> Let's see what job security really is:
>
> First, is obtaining a job from the employer. (The union does not provide jobs. Ask the union if they will guarantee a new job if you quit or lose your job.)
>
> Second, job security is working for a healthy, growing company, with assurance of steady work. (The Union does not provide this either. All your wages and benefits, equipment, tools, etc., that you see around you are paid for by the company, not the union.)
>
> In simple terms, job security is:
>
> - Having a placed to work:
> - Having the proper tools and equipment to work;
> - Having no interruptions of work; and
> - Getting paid every payday
>
> How many of those thing[s] can the union deliver on? None, especially not the last one. Ask them what security they have for employees that are out on strike.
>
> Union's unreasonable demands, slowdowns, strikes, and opposition to improved methods of production all hurt a company's ability to operate profitably. A sound and profitable business will provide job security. Not empty promises as the union has been telling you.
>
> There can be no job "security" without a job
>
> Attached is a "union guarantee". Show it to the union next time they visit you. Anytime you spend money on something, you expect some sort of guarantee. The same is true with the union—if they want to charge you monthly dues, assessments and fines, they should give you a guarantee as to what you will receive in return for your money.
>
> . . . Make them give you one! If they say "NO", you should say "NO" to the union.

5. The events respecting the disputed promise of a wage increase

Nicholas Martinez testified that about 1 week before the November 12, 1997 election he along with two other employees, brothers Juan Pacheco and Gustavo Pacheco, visited the home of Supervisor Salvador Jimenez. He testified that in the presence of Juan and Gustavo Pacheco he had the following exchange with Jimenez:

> Well, I was the one that started the talk, the conversation. Because at that time I was going to go to Mexico when the elections were going to be, I think. I told Salvador Jimenez that maybe I was going to go and join the Union. Maybe I was going to vote for Mrs. Lee Mo because it was not convenient for me that the factory was going to close down or there was going to be a strike because I had to go to Mexico. . . .
>
> And then he said, "We better get to work and convince the flour people to vote for the owner, to vote for the lady. And I'll talk to the lady to see that you get a raise after the elections."

Martinez further testified that on the day of the election or the day preceding he had an additional conversation with Jimenez and "the counselor . . . the one who was going to do the counseling of the Company," in which Martinez told Jimenez that "the flour people were ready, that they were going to vote for the lady" and Jimenez responded that "he also had talked to the lady and she said that if she won the election she was ready, she was willing to . . . give us a raise if they won the election." Yet another conversation between Martinez and Jimenez occurred about 2 days after the election in Martinez memory. Martinez approached Jimenez and asked him if, and when, they were going to get a raise and was told that "the lady" had to wait 10 to 12 days for the Union to "go away."

Juan Pacheco recalled that he was present with Nicholas Martinez and Salvador Jimenez at Jimenez' home as Martinez testified, but recalled only that Jimenez told them that the election would be won. His January 22, 1998 affidavit asserts:

> I was present when Salvador Jimenez told us that we would get a raise after gaining the voting process—after winning the voting process from the Company. He said that [at] his house—Salvador's house—and he also stated at the factory—From the factory there were—Salvador, Nicholas and I were there. He said it several times.

Salvador Jimenez testified that on a weekend day sometime before the election, while he and his brother were barbecuing in his backyard, Nicholas Martinez, Juan Pacheco, and a third individual he had not seen before or since came to visit. He recalled Martinez initiated a conversation about the Company and the Union asking various questions respecting what was going to happen after the election, e.g., would the plant close if the Union won the election, if the employees voted for the Employer would Mo raise salaries? Jimenez testified he answered all these questions with the simple assertion that he did not know.

Jimenez testified that Martinez then asked him whether or not Mo would raise salaries if Martinez and the others got the employees to vote against the Union. When Jimenez repeated he did not know, he recalled Martinez asked: "[S]ay why don't you talk to Mrs. Mo and ask them to raise up the salary, and we work for the company, and I said no, I can't do that." After several essential repetitions of this exchange, Jimenez told Martinez he would not speak to Mo and that Martinez should go talk to Mo himself, to which Martinez indicated that they could not talk to her in Spanish and Jimenez should go with them at least as a translator. Jimenez answered that he would do that for them but that he would not do more, could make them no promises, and that he had no authority to raise wages.

Jimenez testified further that although this agreement was reached, he did not in fact ever talk to Mo about a salary increase for employees either with or without Martinez and or Juan Pacheco nor did he have any further discussions with either Martinez or Pacheco or indeed any other employees about the Union or the giving of wage increases before or after the election.

6. The events surrounding the January 22, 1998 giving of employee affidavits

Apparently a day or two before Thursday, January 22, 1998, Miguel Gomez invited several employees to come to his home

on January 22, 1998, to discuss the situation respecting the union election campaign and meet with a Board agent. Nicholas Martinez testified that on Wednesday, January 21, 1998, while at work Mo, utilizing Supervisor Jose Garcia as an interpreter, asked him if he was going to the union meeting at Miguel Gomez' house and he said he was. Mo denied having this conversation. Garcia did not testify respecting the issue.

Martinez testified that he also had two conversations with Stephen Luk respecting the planned meeting on the next day—first at midday when outside on a break and later at the end of work as he was punching out. Luk first approached him and asked if he was going to Miguel Gomez' house. When Martinez said he was, Luk said that he should attend the meeting but report to Luk about it the next day. Martinez recalled that in the second conversation, Luk again confirmed that Martinez was going to the meeting at Gomez home and laughed and told Martinez that they were very stupid people.

Alfredo Gutierrez testified that on January 22, 1998, Luk also asked him at work if he was going to attend the Gomez meeting and he told Luk that he was not going to do so. Luk, in Gutierrez memory, then told him to attend the meeting and report back to Luk on what was said. Gutierrez in fact attended the meeting and met with and supplied an affidavit to a NLRB agent. Luk testified he had no recollection of this conversation with Gutierrez and, until the subsequent litigation of the case, was not aware that Gutierrez had given an affidavit in the matter.

7. The discharge of Daniel Castañeda

Daniel Castañeda sought employment with the Respondent through Supervisor Salvador Jimenez and was told the only job then available was that of pouring flour from a larger container into smaller buckets as part of the production process. This work is indisputably physically difficult and wearing. Salvador Jimenez testified to some reluctance in considering Castañeda for this position because the task seemingly required a bulkier, stronger individual. Castañeda however asserted he could do the work and commenced employment with the Respondent on August 13, 1997.

The difficulty of the task required that, at least initially, a new flour pouring employee would work at that task for part of the day and do lighter product cutting work for the remainder of the workday. Castañeda started his employment with the Respondent in this manner. Castañeda testified that he continued his training in this fashion until he hurt his hand, which swelled up and made it difficult and painful to pour the flour. He reported his difficulty to Salvador Jimenez who told him that he would be assigned to full time cutting without mentioning that the transfer was permanent or temporary. Castañeda testified that he continued cutting the product without being asked to resume pouring flour until he was precipitously and without warning terminated on September 19, 1998, by Supervisor Jose Garcia who came to him at lunch and said: "[t]he Chinese woman told me there was no more work for you."

Castañeda was not specific respecting precise timing, but placed his injury and the subsequent swelling of his hand complaint to Jimenez, and transfer off the pouring job as occurring rather closely in time to his discharge. He also testified that he participated with other employees in evincing his support for the Union on September 17, 1997, at the facility by joining with the other demonstrators in their efforts that day.

Jose Garcia testified that he directed Castañeda in his work without problem or incident until on or about September 15, 1997, when Castañeda told him: "I cannot do this job anymore because it's too heavy for me, very hard." Garcia reported this statement to Salvador Jimenez and told Garcia he would raise the matter with Mo. The following day Jimenez told Garcia that he was to tell Castañeda that he was needed to pour flour. Garcia went to Castañeda, in Garcia's recollection on or about September 17, and told him he was needed for the flour-pouring job. Castañeda responded that he did not want to do that job because it was too hard. Garcia reported this exchange to Jimenez and thereafter to Mo. Jimenez essentially corroborated the testimony of Garcia.

Mo told Garcia on Friday, September 19, 1997, to direct Castañeda to do the flour pouring work and if he would not do so to replace Castañeda with another who would do the job. Garcia reported this conversation to Jimenez and thereafter asked Castañeda to resume pouring flour which request Castañeda refused. Garcia testified:

> I told him, "Castañeda, Mr. Castañeda, on Friday [September 19, 1997], Mrs. Mo told me she doesn't need you anymore, no come back Monday, because we need one person for that position." At that time he told me, "I hurt my hand." I say, "What I can do? I already asked you two times to do this job, and you didn't tell me anything, so what can I do now?" He said, "Okay, I don't come back on Monday."

Garcia identified and the Respondent entered into evidence two handwritten notes in Spanish as taken by him after conversations with Castañeda on September 17 and 19, 1997. The translations of those entries are consistent with the recitation of Garcia's conversations with Castañeda as set forth above.

Mo and Salvador Jimenez testified essentially consistent with the version of events described by Garcia. Castañeda's employment ended that Friday and he has not been offered reinstatement thereafter.

8. The discharge of Victor Ruiz

Victor Ruiz had been an employee of the Respondent in 1995. He returned to its employ on September 3, 1997. Employees are required to report to work during the interval of 5 to 5:30 a.m.

Ruiz testified that he participated in the work demonstration on September 17, 1998, and had earlier signed a union authorization card. He recalled that work started at 5 a.m. and employees were required to arrive within 30 minutes of the start of work. On the day following the stoppage, Ruiz testified he was late between 15 to 30 minutes. He recalled:

> I arrived. I was going to punch in. Jose Garcia came up; he told me not to punch in, that the Employer said that she was going to hire someone else in my place. I asked him why, he just shook his shoulders and hands and he was saying, "I don't know."

Ruiz testified that although he recalled being told that he should come to work on time by his supervisor, had not received prior warnings for late arrival and was not told by Garcia or Mo, with whom he spoke later that day, that he was fired for being late. He has not been offered reinstatement to date.

Mo testified that she became aware of Victor Ruiz' initial late arrival to work in his second week of employment through the report of either Jimenez or Garcia that he was not present and by means of examining time records which indicated that he had not punched in until around 9 a.m. on September 12—

over 3 hours late. She testified when told by whichever supervisor involved that the supervisor was to warn Ruiz that he had to be timely in his attendance. She thereafter learned that Ruiz was 2 hours late on a second occasion, this time early in the week of September 14, 1998. Again she asked the relevant supervisor to instruct Ruiz on the importance of timely attendance. She testified that on Friday, September 19, 1997, she learned that Ruiz was again late—at that time about an hour late. Before he arrived and punched in, she testified: "We made a decision that day that he should be replaced."

The Respondent introduced payroll records indicating that Ruiz commenced work on September 12 at 9:44 a.m. and on September 18 at 10 a.m.

Jose Garcia testified that he was not aware that Ruiz had been late on September 12 or 18 until Mo raised the matter with him. He testified that Mo told him on September 19, 1997, after the start of the working day, but before Ruiz arrived at the facility that he was to be fired. Thereafter Garcia informed Ruiz that he had been terminated.

C. The Specific Allegations of the Complaint[6]

1. Allegations of violations of Section 8(a)(1) of the Act

The complaint alleges in paragraph 6 that the Respondent's agents, Lee Mo, Stephen Luk, Salvador Jimenez, and Arturo Tovar violated Section 8(a)(1) of the Act through various conduct. The Respondent denied that its agents had violated the Act. These allegations require separate consideration and analysis.

a. Stephen Luk—complaint paragraph 6(a)

(1) Paragraph 6(a)(1) of the complaint

Paragraph 6(a)(1) of the complaint alleges that Stephen Luk on an unknown date in mid-September 1997 (but after September 17, 1997):

> (A) Threatened an employee that Respondent would fire employees who engaged in Union or other protected concerted activities:
>
> (B) Impliedly threaten an employee with discharge or other adverse consequences by telling said employee that employees should not have engaged in Union or other protected concerted activities because they were "new" employees.

As set forth in part above, the sole direct evidence offered to support this allegation was the testimony—primarily the adoption of prior affidavits—of employee Juan Pacheco. Portions of his affidavits entered into the record directly support the allegation. The General Counsel advances this evidence over the denials of Luk. The Respondent argues the contrary.

Juan Pacheco speaks very little English and testified in Spanish. During the investigation of the charges he had given two affidavits to a Board agent. He testified to observing, as opposed to participating in a conversation between Stephen Luk and another individual who may or may not have been an ethnic Chinese or, as the Respondent posits a nonethnic Chinese referred to as "the Chinese Man." While it is clear from Pacheco's testimony that the conversation he was describing included spoken words that new employees Castaneda and Ruiz would be fired for their support of the Union, it was not at all clear whether the statements were made by Luk as the speaker of the words or, whether the words were spoken to him by the other party to the conversation.

Pacheco's testimony was hesitant, his recitation somewhat inconsistent and he indicated little present memory of the events. The General Counsel relied heavily on the affidavits given by the witness. While Pacheco asked to withdraw his affidavits, I find this was because of his great reluctance to participate in the proceeding in any manner, a reluctance that required special efforts to compel his attendance, as opposed to a specific recantation of the contents of the affidavits. His affidavits recite far more directly than his oral testimony that it was Luk who a few days after the work stoppage asserted that Castañeda and Ruiz would be fired on the coming Friday because they were new employees without a right to support the Union. Since the workstoppage occurred on Wednesday, September 17, 1997, and the terminations occurred on Friday, September 1997, this conversation seemingly would have occurred on Thursday, September 18, 1997.

Daniel Castañeda testified that Juan Pacheco told him on or about the day after the recognition events of September 17, 1997, that "the Chinese man told him that I would be fired because I hadn't been working there enough time to be able to join the Union." Miguel Vital Gomez gave similar testimony. Pacheco also testified that other employees were also discussing this situation although other witnesses denied that this was so.

Considering the evidence on the matter in its entirety, including the affidavits, the testimony of Pacheco and Luk and the evidence of prior consistent statements by Pacheco, in light of the burden the General Counsel bears, I do not find the record will sustain the General Counsel's complaint allegation. The evidence from and attributed to Pacheco is muddled. Luk's denials were direct and convincing. As the Respondent argues the probabilities are not compelling. Since in Pacheco's recollection, the other employees were talking about these two individuals being terminated, it is not improbable that comments he heard made by others could be attributed to Luk and his reports to other employees stimulate further employee comment.

The resolution as to this aspect of the case is not a traditional comparison of the credibility of two witnesses whose testimony is in direct conflict so much as a determination that the General Counsel's evidence is fatally weakened by its ambiguity and lack of clarity as well as Pacheco's confusion and reluctance. Given all the above, I find there is insufficient credible evidence to sustain the General Counsel's complaint allegation and it will be dismissed.

(2) Paragraph 6(a)(2) of the complaint

Paragraph 6(a)(2) of the complaint alleges that Luk on an unknown date in early November 1997:

[6] The General Counsel, on brief at p. 6, moved for the first time to amend the complaint to include an allegation that Mo, on September 17, 1997, during the work stoppage, threatened employees with discharge arguing that the threat had been fully litigated. At the commencement of the proceeding counsel for the General Counsel, having been asked if he had any amendments to the complaint to propose, indicated he did not. Subsequently, I informed counsel I greatly preferred that the complaint be amended earlier rather than later respecting unpled violations. Given my determination, as discussed, infra, at fn. 10 and the text referenced therein, that the conduct would not support a finding of a violation of the Act, even if a complaint allegation had been included in the issuing complaint, I find it unnecessary to determine if the complaint amendment should be granted.

(A) Interrogated an employee concerning that employee's Union activities.

(B) Threatened an employee that there would be unspecified reprisals taken against employees who vote for Union representation.

As set forth above, Alfredo Gutierrez testified to two conversations with Stephen Luk in which Luk asked about Gutierrez' and other employees support for the Union and suggested union supporting employees would have "problems." Luk denied ever making such statements or indeed even having a similar conversation with Gutierrez.

Gutierrez was not a union supporter, did not participate in the work stoppage, and was a careful and thoughtful witness. His demeanor created in me the strong impression that he was testifying honestly and limiting his testimony to the matters he recalled. He was a very impressive witness and instilled in me great confidence in his veracity. Luk's numerous recitations that he had no recall of the events described by and attributions made by Gutierrez were simply far less persuasive. Gutierrez had no obvious motive to simply lie and fabricate these events. It is far more probable that Luk even if only subconsciously might find it far more preferable to fail to recall events that would embarrass him and his employer.

One argument made by the Respondent bears separate consideration. The Respondent notes that while the Respondent's first level supervision is bilingual speaking fluent Spanish and English, unit employees speak essentially only Spanish and management, i.e., Luk and Mo essentially do not speak Spanish. This circumstance, argues counsel for the Respondent on brief, makes it very unlikely that conversations between management and unit employees could take place absent intermediate translation and, for that reason, the testimony by employees respecting such conversations should be discredited.

The Respondent's argument is relevant, but must be judged in the circumstances of each conversation. Gutierrez testified that his conversations with Luk were in both Spanish and English and that he understood Luk sufficiently. Since I found Gutierrez to be an honest and forthright witness, I also credit this assertion. Further, it must be recognized that intelligent individuals—and Luk and Gutierrez each seemed to qualify on this record—who work in a bilingual setting such as the Respondent's workplace dealing with others who speak another language for a period of years are able to communicate, even if somewhat inefficiently, by mixing language, gesture, and any other mutually understandable aid to understanding.

Based on demeanor and the record as a whole, I credit Gutierrez over Luk where their versions of events differ. This being so, there is no question that Luk wrongfully inquired of Gutierrez as to the union sympathies of employees and suggested union supports would have problems. These statements are traditional violations of Section 8(a)(1) of the Act, and I so find. Accordingly, I sustain this allegation of the complaint.

(3) Paragraph 6(a)(3) of the complaint

Paragraph 6(a)(3) of the complaint alleges that Luk on or about November 5, 1997, by letter to employees, threatened employees with loss of their jobs because of their support for the Union.

This allegation is based on the letter quoted, supra, distributed to employees over Luk's signature as part of the Respondent's election campaign. The General Counsel on brief emphasizes the bold letter assertion in the document: "There can be no job security without a job." The Respondent, citing *Action Mining*, 318 NLRB 652 (1995), argues the letter is benign and permissible in its entirety and does not rise to the level of a violation of the Act.

The entire letter explains the Respondent's meaning and usage of the phrase "job security" in the context of the election campaign document and does not improperly suggest that employee jobs are at risk because of their possible selection of the Union to represent them. I find the General Counsel has not sustained his burden respecting this complaint allegation and it shall be dismissed.

(4) Paragraph 6(a)(4) of the complaint

Paragraph 6(a)(4) of the complaint alleges that Luk on or about January 22, 1998, interrogated employees concerning their union activities and instructed employees to engage in surveillance of the union activities of other employees.

As noted supra, Nicholas Martinez testified to two conversations with Stephen Luk in which Luk asked about the employee meeting scheduled on January 22, 1998, and instructed Martinez to attend and report back. Alfredo Gutierrez testified to similar independent conversations with Luk. Luk denied all the attributions.

As noted supra, I was very impressed by Gutierrez as a witness and specifically credited him over Luk respecting the events alleged to violate the Act in complaint paragraph 6(a)(2). I do so here on the same basis. Martinez' testimony of a similar situation, corroborated in its pattern and timing by the credited testimony of Gutierrez, is also credited over Luk's denials.[7] Luk's conduct in asking about the employee's attendance at an employee union meeting and in seeking reports on the details of the meeting are classic interrogation and surveillance violations of Section 8(a)(1) of the Act. I sustain this allegation of the complaint.

b. Arturo Tovar—complaint paragraph 6(b)

Complaint paragraph 6(b), in a dozen subparagraphs, alleges that Arturo Tovar in meetings with employees during the period preceding the election made various statements which violate Section 8(a)(1) of the Act. Arturo Tovar was retained by the Respondent to conduct small group employee meetings during the preelection period at the facility. There is no question he held meetings with employees from October into early November 1997.

As described briefly above, substantial testimony was received from many witnesses respecting various meetings. The General Counsel's witnesses generally testified to alleged improper statements made by Tovar in these meetings while the Respondent's witnesses testified that Tovar did not make improper statements at the meetings that they attended. The General Counsel's witnesses in some cases also testified that Tovar did not make improper statements attributed to him by other witnesses. Tovar testified that he simply did not make any of the wrongful statements attributed to him. Although he could not distinguish individual meetings in his mind's eye, he testified that he followed a general outline of material he wanted to cover at each meeting and—as a professional trained in labor law and the restrictions and limits imposed on an employer's representative under the Act—did not violate the Act.

[7] Given Luk's parallel statements to Martinez and Gutierrez, Luk's statements to Martinez do not expand the remedy directed herein.

The General Counsel argues that while Tovar may not have made improper statements at each and every meeting, he did so at some meetings and the witnesses who claimed he did not simply did not attend the meetings in question. The Respondent to the contrary notes that even the General Counsel's witnesses impeach other General Counsel witnesses by recalling that Tovar did not make the statements attributed to him.

I found Tovar a credible witness with a sound demeanor. I do not believe he made many of the cruder statements attributed to him. Thus, I do not credit the witnesses whose testimony is set forth above, who suggested Tovar told the employees that the Respondent would not sign a contract, would close the facility, would fire union supporting employees and that a strike of great length would occur if the employees selected the Union. I find rather that the employees, who were not well grounded in the intricacies and subtleties of labor law and Board standards, misconstrued Tovar's permissible statements and, further, simply misrecalled what was said. The simple reality of NLRB practices, procedures, and decisional law is such that nuances and fine distinctions, for example, between the permanent replacement of employees engaged in an economic strike and replacing workers generally, is not easily or quickly understood by laity ungrounded in our esoteric discipline.

Similar dangers of misconstruction and misapprehension occur in other substantive areas such as the employer's obligation to bargain but lack of an obligation to sign a particular contract or an employer's assertions that, if objective conditions warrant as a result of increased labor expense, there may be a risk of business closure. Indeed it may be fairly anticipated that a skilled employer-labor representative speaking to employees in support of the employer's position in a union election campaign would attempt to sway employees by going to the limits of what may be properly asserted. Since individuals generally recall what they have made sense of, and in these settings misunderstandings are rife, I find that the employees, whosoever honest in their testimony, simply did not recall or repeat in court the actual words used by Tovar. Given Tovar's denials and my doubts respecting the testimony of the others, I credit Tovar. I shall therefore dismiss the various subparts of complaint paragraph 6(b) save as further discussed below.

Employee Ramon Quintero, as noted above, testified with particular specificity respecting Tovar's remarks in the two meetings he attended. I was very impressed with the clarity his memory and his seeming willingness to testify to only what he recalled was said without apparent confusion or embellishment. Quintero's demeanor was very sound. I credit his testimony respecting what was said by Tovar in the two meetings he attended. I do not find that Tovar's testimony is directly contrary to Quintero but were it to differ, I would credit Quintero over Tovar for Quintero's testimony was a specific recollection of a specific meeting whereas Tovar's recitation was rather a general survey of the entire course of meetings.

Quintero recalled that in the second employer held campaign meeting he attended on October 29, 1997:

> [Mr. Tovar] started talking about strike again, in different ways. And he asked us why that union—if that union represented hotels and restaurants and they didn't know anything about manufacturing companies. I told him that it was perhaps because it was the only one we knew.
>
> Tovar said, "Why don't you talk to the owner to try to get at the problem? Why use third persons if everything can be taken care of there?" He said, "Vote no, against the Union." He thought that simply—by simply having the threat of the union that would be enough to—for it to have favorable changes for the employees.
>
> And I asked him if this was a promise he was making us. He said, "No." I said, "But this is what you are implying." He said, "Take it as you please."

Complaint subparagraph 6(b)(2)(A)(B) specifically alleges that the Respondent on October 29, 1997, during employee meetings through Tovar:

> (A) Told employees that they did not have to vote for the Union during an up-coming NLRB election because the mere threat of unionization would cause Respondent to make favorable changes in their working conditions;
>
> (B) Instructed employees to abandon their support for the Union and to talk to Respondent about their problems because Respondent would make favorable changes in their working conditions;
>
> (C) Interrogated employees about their Union sympathy.

Tovar's question to employees as to why the particular union, i.e., a hotel and restaurant local union, is clearly an indirect interrogation about the employees' union activities, if not intended simply as a rhetorical predicate to a campaign speech. The fact that an employee answered the question seemingly suggests that the question was either intended to or was fairly taken by the listening employees to have been intended to be answered by those employees. In the setting of an employee meeting held at the Employer's initiative for the purpose of delivering the Employer's election positions to employees, and without any ameliorating circumstances—which are absent on this record—Tovar's question is an interrogation which inevitably chills employees' Section 7 rights to support the Union without divulging to the employer any information respecting that support. I find that the statement violates Section 8(a)(1) of the Act and I sustain complaint subparagraph 6(b)(2)(C).

Turning to the other two subsection of complaint subparagraph 6(b)(2), the Board in *Embassy Suites Resort*, 309 NLRB 1313 (1992), held at 1316:

> It is well established that when an employer, as here, institutes a new practice of soliciting employee grievances during a union organizational campaign, "there is a compelling inference that he is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined inquiry and correction will make union representation unnecessary."[14]

[14] *Reliance Electric Co.,* 191 NLRB 44, 46 (1971).

I find that the remarks of Tovar respecting problem resolution in Quintero's credited testimony meet the Board's quoted standard for a violation of Section 8(a)(1) of the Act. There is no evidence of a history of grievance solicitation in employee meetings on this record, rather the implication, indeed the essentially acknowledged implication, of Tovar's remarks to employees, was that the employees, now having threatened to bring in a union, had gotten the employer's attention and they should now report their "problems" to the Respondent for "favorable changes." I find these statements violate Section 8(a)(1) of the Act as alleged and I therefore sustain complaint paragraph 6(b)(2)(B).

c. Salvador Jimenez—complaint paragraph 6(c)

Complaint paragraph 6(c) in two subparts alleges that Salvador Jimenez:

> (1) On two separate occasions in late October/early November and mid-November 1997, promised employees that if they convinced other employees to vote against the Union, they would receive wage increases and/or higher wage increases than would be received by employees who supported the Union, and,
>
> (2) In late November 1997, reaffirmed to an employee that Respondent would grant wage increases to employees who voted against the Union.

The allegations respecting Salvador Jimenez rely on the evidence of Nicholas Martinez and Salvador Pacheco, which is denied or substantially recast by Jimenez. There is agreement that Salvador Pacheco, Martinez, and another came to Jimenez' home where Martinez had a conversation with Jimenez respecting the upcoming union election and the likelihood of what would happen thereafter. Martinez and Pacheco's generally corroborative versions of the conversation suggests that when Pacheco suggested the employees could support the Respondent in the election, Jimenez said that, if they could "convince the flour people to vote for the lady," Jimenez would "talk to the lady to see that you get a raise after the elections."

Jimenez' version of the conversation attributes to Martinez the initiation of the question "whether or not Mrs. Mo would raise salaries if Martinez and the others got the employees to vote against the Union." In Jimenez recollection, he simply said he did not know and directed the employees directly to Mo. Martinez then asked if Jimenez would speak to Mo for them in English and, finally, Jimenez agreed to act as interpreter for them but would not do more and could make no promises.

A second difference in these witnesses' testimony addresses what happened in consequence of this meeting. Jimenez testified that although he had agreed to act as interpreter for Martinez, in fact no meeting took place between Martinez and Mo or any other agents of the Respondent. He testified that he did not discuss the matter with Mo or other agents of the Respondent and the matter simply ended without further ado. Mo testified that she never discussed an employee raise with Jimenez.

Martinez to the contrary testified he had two more conversations with Jimenez. The first occurred just before the election in the presence of "the counselor . . . the one who was going to do the counseling of the Company."[8] In that conversation Martinez told Jimenez that the "flour people" were ready to vote for the lady and Jimenez responded that he had talked to Mo and that, if the employer won the election she was ready and willing to give employees a raise. The second conversation between Jimenez and Martinez alone a few days after the election which resulted in an apparent defeat for the Union. In that conversation Martinez recalled asking Jimenez if, and when, the employees were to receive their raise. Jimenez responded, in Martinez' recollection, that the "lady" had to wait 10 to 12 days for the Union to go away.

[8] The General Counsel argues that this testimony establishes that Tovar was the third party to the conversation and, since he did not address it in his testimony, an adverse inference should be drawn. I do not find the evidence sufficiently clear to draw such an inference.

The General Counsel argues that Martinez testimony, supported by Pacheco's affidavit should be credited. Thus the General Counsel seeks a finding that the Respondent seized on the offer of Martinez to encourage opposition to the Union in exchange for a raise and surreptitiously promised the raise in exchange for the employees votes only to find it inappropriate to grant the promised increases in the event. Such a sequence of events would clearly be a violation of Section 8(a)(1) of the Act.

The Respondent argues to the contrary however noting that Jimenez had received training in what he could and could not do or say during the election campaign and would have certainly known that it was improper to promise a wage increase for employee opposition to the Union. Indeed, as the Respondent notes, other employees testified that Jimenez took a benign role in the campaign declining to advise employees beyond urging them to reach there own decision on the matter.

The issues as to these disputed events are far closer that either side concedes in its argument. Considering the conflicts in light of the probabilities of events and the demeanor of the witnesses, as well as the credibility resolutions and unfair labor practice findings made elsewhere in this decision, the record as a whole and, importantly on this question, the burden the General Counsel bears respecting the complaint allegation, I find there is insufficient credible evidence to sustain these complaint allegations. As discussed above, Pacheco's affidavit and testimony under all the circumstances are not as persuasive in corroborating portions of Martinez testimony as they might otherwise be. Martinez' version of these events reveals a certain expediency regarding the issue of union representation which detracts to a degree from the persuasiveness of his testimony. More simply put, I credit Jimenez testimony over that of Martinez and Pacheco and find that the Respondent neither sought of nor agreed to pay Martinez or Pacheco in the form of wage increases for the organization of employee opposition to the Union. Accordingly, I shall dismiss the above referenced complaint allegations.

d. Lee Mo

Complaint paragraph 6(d) alleges in two subparts that Lee Mo:

> (1) On an unknown date in early November 1997, directed an employee to compile a list of employees and to indicate on said list whether the listed employees supported the Union,
>
> (2) On or about January 21, 1998, interrogated employees about their Union activities.

The complaint subparagraph 6(d)(1) allegation relies onAlfredo Gutierrez, who testified, as set forth in greater detail supra, that Mo asked him to "check how many people signed for the union." As discussed in my resolutions of the testimonial conflicts respecting complaint subparagraph 6(a)(2) supra, I was very favorably impressed with the testimony of Gutierrez.

Mo denied making the statements attributed to her. Mo further testified that she speaks little Spanish. As noted, supra, the Respondent argues this fact makes the likelihood of such a conversation very small and generally undermines the testimony of Gutierrez. However, as noted supra, I have credited Gutierrez that he speaks sufficient English to have understood the statements made to him. Further, Gutierrez was clearly able to understand and recall Mo's statement during the work dis-

ruption on September 17, 1997, that "[T]hese guys only work for short time," which statement Mo essentially agreed she made albeit in a somewhat different context then that suggested by Gutierrez.

Considering the demeanor of the conflicting witnesses and the record as a whole, I credit Gutierrez over Mo respecting these disputed vents. Simply put I found Gutierrez demeanor superior to that of Mo. I also find it far more probable that Mo found it more convenient to fail to recall a potentially embarrassing event than Gutierrez would have fabricated such an event. I find therefore that Mo did in fact ask Gutierrez to "check how many people signed for the union." This is again a classic violation of Section 8(a)(1) of the Act and I so find. The allegation of the complaint is sustained.

Complaint subparagraph 6(d)(2) addresses the contention of Nicholas Martinez that Mo asked him on January 21, 1998, if he was going to the meeting at Miguel Gomez' home on the following day. Mo denied this conversation. I have credited, above, Martinez' testimony that Luk also asked Martinez to attend and report on this meeting in part because the action by Luk was essentially identical to the credited testimony of Gutierrez that Luk made the same request of him. Martinez was not nearly so credible in his testimony as Gutierrez and is not on this record superior in demeanor to Mo. However in light of the credited evidence of parallel conduct by Luk and my earlier discrediting of the denials of Mo respecting the election day events with Gutierrez, discussed immediately above, I credit Martinez over Mo as to these events. I find the General Counsel has met his burden respecting subparagraph 6(d)(2) of the complaint.

e. Complaint subparagraph 7(e)

Complaint subparagraph 7(e) alleges:

> On or about October 24, 1997, through a leaflet distributed to employees, impliedly threatened employees with loss of their jobs if they select the Union to be their collective bargaining representative in the upcoming NLRB election.

The complaint subparagraph challenges the October 24, 1997 leaflet distributed to employees, quoted in full, above. In essence the leaflet is an ad horrendum campaign piece directed to the possibility of a strike, if the Union represents the Respondent's employees and the dismal situation this situation would present for strikers. While the General Counsel's analysis and argument respecting the document is thin and without citation of authority, in essence the General Counsel argues on brief that the leaflet "does not explain that economic and unfair labor practice strikers have reinstatement rights." The Respondent argues the leaflet does not, standing alone, violate the Act and, in all events, was part of a broader explanation by Arturo Tovar of the intricacies of the Act and must be judged as simply a part of a benign larger whole.

The leaflet identifies the strike it is describing as "[t]he union's only real weapon to force its demands when bargaining breaks down," i.e., an economic strike not an unfair labor practice strike. The leaflet says that strikers in support of such a strike: "face the possibility of losing their jobs while permanent replacements are working in their place." The assertion, while not perhaps a classic distillation of the law by Judge Learned Hand, is close enough to serve as an explanation of the rights of economic strikers.[9] The leaflet in my view is not a misrepresentation of the law of the Act nor is its use as occurred herein a violation of it. I shall dismiss this paragraph of the complaint.

2. Allegations of violations of Section 8(a)(3) and (1) of the Act

The complaint alleges at paragraph 7 that on or about September 19, 1997, the Respondent discharged two employees, Victor Ruiz and Daniel Castañeda, because of their union or other protected concerted activities in violation of Section 8(a)(3) and (1) of the Act.

The Board in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), established a test for approaching discrimination allegations which was restated in *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996):

> Under [*the Wright Line*] test, the Board has always first required the General Counsel to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. *Office of Workers Compensation Programs v. Greenwich Collieries*, [114 S.Ct. 2551, 2557–2558 (1994).]

It is appropriate to consider the discharges utilizing that analysis. The arguments of the parties common to the two alleged discriminatees will be initially discussed and then each individual will have his particular circumstances considered.

a. The General Counsel's Wright Line burden to persuade that antiunion sentiment was a substantial or motivating factor in the Respondent's discharge decision

The General Counsel's theory may be briefly set forth as follows. First, the Respondent and Mo in particular harbored animus against the Union arising out of the former period during which the Union represented the Respondent's employees. Indeed the General Counsel introduced evidence that Mo soon after her husband's death in 1994 made the statement that she felt the Union and the difficulties it imposed on the Respondent contributed to her husband's death. While Mo testified that at that unfortunate time in her life she was not clearheaded and blamed essentially everyone including herself for her husband's death, I find the General Counsel has established the Respondent's animus against the Union and union representation of its employees.

Second, the General Counsel argues that the Respondent, Luk, and Mo in particular, well knew of the union support of employees Victor Ruiz and Daniel Castañeda by virtue of their open participation with other union supporting employees in the work disruption in support of the Union's demand for recognition on September 17, 1998. The Respondent challenges this assertion first by relying on the testimony of Luk and Mo

[9] In *Marquez v. Screen Actors Guild, Inc*., 119 S.Ct. 292 (1998), in a case involving the use of Board language in lieu of a broader explanation of the implications of that language, Justice O'Conner writing for a unanimous Court held:

> Petitioner' s argument that the failure to explain all the intricacies of a term of art in a contract is bad faith has no logical stopping point; that argument would require that all the intricacies of *every* term used in a contract be spelled out.

The force of that argument seems to apply with equal relevance here.

that they did not associate these two with union support on September 17 and, by making the logical argument that in the confusion of the moment and the large number of employees participating in the dispute, and given the duties and responsibilities of Mo and Luk on the occasion, there would have been little likelihood either would have been able to identify particular individuals who were supporting the union during the event that day.

The General Counsel buttresses his argument with the testimony of Gutierrez, set forth above in greater detail, that Mo while working to keep the equipment working in the middle of the disruption stated: "These guys will only work a short time." Mo recalled her comment as rather: "one of these guys only work for short time," or "some of these guys maybe just work for a short period of time." She explained that the comment was made to no one in particular, but was rather a simple talking-to-oneself expression of incredulity that the workers who had been employed by the Respondent for insufficient time to have worked when the Union earlier represented the Respondent's employees and hence could have no experience with representation by the Union were supporting the Union with such enthusiasm.

The General Counsel argues that Mo's statement is a bald threat and prediction announcing exactly what then took place. Thus, "these guys," i.e., the two alleged discriminatees, "would only work for short time," i.e., were fired 2 days later, because of their support for the Union's demand for recognition on September 17, 1997. The Respondent argues that the verbal aside was simply a benign speculation free from malice and irrelevant to the allegations at issue. I credit Mo's explanation and find that the statement was not one of an intention to terminate any employees and further was not intended to be overheard by employees.[10] Under either version of what Mo said aloud and irrespective of her motive for making the statement, it clearly supports the General Counsel's theory that Mo was aware that at least some of her newer employees were supporting the Union.

This theory is further sustained by the testimony, which I credit, of employee Guadalupe Meza called by the Respondent who testified on cross-examination that he heard Mo asking an Asian employee which employees had joined the demonstration and which had not stopped working. Mo's denials of the actions attributed to her in this testimony are discredited. Meza's testimony was clear and direct and his demeanor superior to Mo respecting this aspect of her testimony.

The General Counsel advances the timing of the September 19, 1997 discharges that fell hard after the Union's workplace demonstration on September 17, 2 days before. The record is devoid of evidence supporting employer knowledge of employee union activities before September 17, on which date the Union's demand for recognition and worker demonstration of support without doubt made an impression on the Respondent's agents. Thus, the General Counsel contends that, faced with the Union's demand for recognition and the apparent support of a substantial number of its employees, the Respondent undertook "immediate and coercive steps to stifle the union organizing campaign" (G.C. Br. at 33). The Respondent did so, the General Counsel argues, by selecting new and therefore the most expendable of the employees who demonstrated on behalf of the Union and discharging them in a manner calculated to have the biggest impact on employees.

Given all these factors[11] supporting his case, the counsel for General Counsel argues that he has met the General Counsel's burden to persuade that antiunion sentiment was a substantial or motivating factor in the Respondent's discharge decision. I agree and find that the evidence advanced by the General Counsel above, either not in essential dispute or credited, above, sustains the initial *Wright Line* test described in *Manno Electric as quoted above.* I find, therefore, consistent with that analytical scheme that the burden of persuasion shifts to the Respondent to prove its affirmative defense that it would have taken the same actions against employees Victor Ruiz and Daniel Castañeda even if the employees had not engaged in union activity.

b. The Respondent's affirmative defenses

The Respondent's defenses at this stage of the analysis are best considered on an employee by employee basis.

(1) Victor Ruiz

Victor Ruiz had been an employee of the Respondent's in 1995 and returned to its employ in early September 1997. The Respondent introduced documentary and testimonial evidence that Ruiz was late to work on September 12, 18, and 19. As set forth in greater detail, infra, the Respondent's witnesses tell the tale of a relatively new employee repeatedly late who was discharged in consequence.

The Respondent argues further that other employees who started work in August and September 1997 were not terminated during the election campaign and that in August and September 1997 three other employees—not counting Castañeda, were terminated. Thus, neither was it true that the Respondent terminated all or even many new employees or that it was unusual to terminate employees in the period.

The General Counsel—in addition to the arguments discussed in the initial stage of this analysis, above, attacks the Respondent's evidence in several ways. First, counsel for the General Counsel points to various inconsistencies in the testimony of supervisor Jose Garcia and Mo respecting the details of the events and attacks the documentary evidence offered by the Respondent as "doctored" or "fabricated." Second, the General Counsel argues that Ruiz was never given a formal warning or other progressive discipline short of discharge regarding his lateness.

I have considered the arguments of the parties on the Ruiz discharge in their entirety in light of the demeanor of the witnesses and the record as a whole with the burden of persuasion at this stage of the analysis explicitly on the Respondent. I find that the Respondent has met that burden. Thus, I find the Respondent has established that it would have discharged Ruiz even had he not participated in the workplace demonstration on September 17, 1997.

I reach this conclusion because, while I have carefully considered the General Counsel's arguments as advanced at trial

[10] Were the statement to have been alleged in the complaint as a violation of Sec. 8(a)(1) of the Act, I would dismiss the allegation.

[11] I have omitted the arguments advanced by the General Counsel based on statements attributed to the Respondent's agents by employee witnesses which testimony was discredited by me and which statements were found not to have occurred. For example, the discredited testimony of Pacheco that Luk said on September 17 that Castañeda and Ruiz should not have supported the Union and would be fired on Friday.

and on brief, I do not find the attacks on the Respondent's evidence in this aspect of the case effective. There were variations in the versions of events between Garcia and Mo but I found them more plausibly part of the normal variations in the recitation of events among different participant than suggestive of a fabricated scenario or scheme to provide a pretext for a discharge for concealed reasons. Rather, and I reach this result in part on a favorable evaluation of the demeanor of Jose Garcia and Lee Mo in this part of their testimony, as compared with that of Ruiz, I simply believed Mo that she made a business decision respecting Ruiz unrelated to the September 17 work stoppage or employee union activities.

Given these credibility resolutions and other findings, I conclude that Ruiz was not terminated in violation of Section 8(a)(3) of the Act and I shall dismiss this element of the complaint.

(2) Daniel Castañeda

In many ways Castañeda's discharge raises similar issues to Ruiz' discharge. In each case the alleged discriminatee describes a situation in which without apparent warning or justification the Respondent's agents discharge him without a formal warning or other discipline short of discharge. In each case the discharge falls on Friday, September 19, 1997, 2 days after the workplace demonstration.

The Respondent's case, as set forth in greater detail above, includes testimony from Mo and Supervisors Garcia and Jimenez respecting a series of events which if credited would have not unreasonably led Mo to discharge Castañeda. The General Counsel's argument is, in part, that these three individuals and perhaps Luk who denied any knowledge of, or role in, the discharge of Castañeda until after the event was consummated, are in essence lying and have entered into a conspiracy to falsify their testimony to conceal the true basis for Castañeda' discharge. Such arrangements are not unheard of nor have I not seriously regarding the General Counsel's arguments. Simply put, I am not persuaded even, as is the case at this stage of the analysis, where the Respondent bears the burden of persuasion.

As the Latin maxim runs, the testimony of witnesses is to be considered not merely numbered. The three witnesses on the Respondent's behalf had sound demeanors during these portions of their testimony. It is not so much that Castañeda had a markedly inferior demeanor rather: (1) that the three were each at least as solid as witnesses; (2) they were mutually corroborative—save for minor details which fell within the normal range of human variation—and, (3) told a story neither inherently implausible nor at fatal variance with the remaining credited portions of the record evidence.

In summary, I have considered the arguments of the parties on the Castañeda discharge in their entirety in light of the demeanor of the witnesses and the record as a whole with the burden of persuasion at this stage of the analysis explicitly on the Respondent. I find that the Respondent has met that burden. Thus, I find the Respondent has established that it would have discharged Castañeda even had he not participated in the workplace demonstration on September 17, 1997.

Given these credibility resolutions and other findings, I conclude that Castañeda was not terminated in violation of Section 8(a)(3) of the Act and I shall dismiss this element of the complaint.

3. Allegations of violations of Section 8(a)(5) and (1) of the Act

The concept of a bargaining order as a remedy for unfair labor practices was elucidated by the Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Relevant to the instant case, the Court distinguished between the situation in which the union had at one point a card majority and the employer's conduct has a tendency to undermine majority strength and impede the election processes, with the situation where the employer's unfair labor practices are minor and less extensive and have only a minimal impact on the election process. In the former situation the Court approved the Board's direction of a bargaining order. In the latter the Court determined no such order was appropriate.

In the years following the Court's decision, the Board's categorization of numerous bargaining-order cases into one or the other of these two general classes has created a substantial body of law on the issue. While the parties vigorously contested the issue of whether all the allegations of the complaint in their totality supports a bargaining order remedy, it is appropriate at this stage of the analysis to determine only if the unfair labor practices found herein support or require such a remedy. I find there is little question that they do not.

The violations found include the Respondent agents' wrongful interrogations, solicitations of surveillance of other employees' union activities, and solicitation of grievances with implied promises to remedy those grievances. Without denigrating the seriousness of the violations or the importance of a remedy to those violations, utilizing the Court's language, I find the violations are minor and less extensive and have only a minimal impact on the election process. I conclude these violations are insufficient to support a finding that a new election could not be fairly conducted. Thus, it is neither necessary nor appropriate to issue a bargaining order herein. This being so, it is unnecessary to consider whether or not the Union had obtained valid and timely majority support in the bargaining unit or other predicate facts necessary for a bargaining order to issue.

IV. THE OBJECTIONS

The March 2, 1998 report and recommendation on objections, order consolidating cases, and notice of hearing sets forth the Union's objections which remain at issue:

> 2. The Employer, by its agents, intimidated eligible voters with loss of employment opportunities if they supported the Union
>
> 3. The Employer, by its agents, made promises of benefits to those eligible voters who would vote against the Union, and made promises of benefits to all eligible employees as an inducement not to vote for the union, and promised benefits it the Union lost
>
> 6. The [Employer], by its agents, interfered with, restrained and or coerced employees in the exercise of their rights guaranteed by Section 7 of the Act;
>
> 7. The [Employer], by its agents, interfered with, restrained and or coerced employees in the exercise of their rights guaranteed by Section 7 of the Act.

These objections adopt the allegations of the complaint which are alleged to have occurred on or between the date of filing of the representation petition, September 24, 1997, and the date of the election, November 12, 1997. The objections raise no new

factual issues beyond those addressed, above, in the unfair labor practice portion of this decision.

An election may be set aside only if improper conduct occurred after the filing of the petition and before the election is concluded. The prepetition allegations of violations of Section 8(a)(1) and (3) are therefore immaterial to the resolution of the objections. So, too, the postelection allegations of the complaint have no relevance to the objections at issue herein.

With respect to the unfair labor practice allegations that were alleged to have occurred in the relevant period, a portion, including the "wage increase" and "campaign literature" allegations as well as certain allegations pertaining to Tovar, have been found without merit above. Having found the conduct at issue respecting those allegations did not occur as alleged in the complaint, and based on that analysis, I find that the Employer's activities therein considered do not constitute objectionable conduct.

The remaining portion of the complaint allegations falling within the petition date-election date window are the allegations of subparagraph 6(a)(2) of the complaint respecting Luk and subparagraphs 6(b)(2)(B) and (C) involving Tovar. I have sustained those allegations, supra. No further factual analysis of those allegations need be undertaken save a revisiting of the timing of the events underlying complaint subparagraph 6(a)(2). The complaint alleges these events occurred in "early November." While determining a precise date of the events within November was not of great significance for purposes of the unfair labor practice analysis, it is critical to the objections analysis that the events be located either before or after the November 12, 1997 election. I find there is no question the events found to violate the Act occurred before the election. The credited testimony of Alfredo Gutierrez was that the conversation underlying the complaint allegation occurred 1 or 2 weeks before the election. Further, the content of the conversation as presented in Gutierrez' credited testimony supports the conclusion that the conversation occurred in the preelection period for the conversation with Luk concerned the extent of employee support for the Union and such issues are invariably of concern before or during and not after the election.

The unfair labor practices found above which were also found to have occurred within the objections window include Tovar's October 29, 1997 statements at a meeting of employees and Luk's preelection statements to a single employee. In considering such conduct for purposes of determining if a new election should be directed, the Board looks to the number of incidents involved, their severity, the extent of dissemination, the size of the unit and other relevant factors. *Archer Services*, 298 NLRB 312 (1990). The test is an objective one—whether the conduct has a tendency to interfere with employee free choice. *Hopkins Nursing Care Center*, 309 NLRB 958 (1992).

In the instant case the vote among the approximately 43 eligible votes was very high—43 ballots cast—and the result was very close. Indeed, the balloting was as close as it could be and not require additional investigation of the two remaining challenged ballots. The Regional Director's Report and Recommendations on Objections notes that of approximately 43 eligible voters, 19 cast ballots for the Union and 21 against. The eligibility of two additional challenged voters whose ballots were impounded was not resolved because the two ballots, even if counted, were arithmetically insufficient to change the final result, i.e., even if both ballots were found properly counted and were in favor of the Union, the Union would have obtained a tie vote and would not have achieved a majority of the valid votes cast.

The statements of Tovar and Luk, found violative of the Act as set forth in detail above, of their very nature would have a likelihood of swaying employee voters. I find the conduct had a tendency to interfere with employee free choice. Tovar's wrongful conduct was directed to at least four employees. Further, the General Counsel established that there was significant dissemination of Tovar's statements at these election meetings by attending employees to other employees. Given the size of the direct and indirect audience to the Respondent's improper conduct, there is no question and I find that the wrongful conduct involved here is not isolated, de minimus or insufficient to have had an effect on the election result. Thus, I find the Employer's improper conduct likely interfered in free employee election choice and, in light of the close result of the balloting, likely made a difference in the election result. Given all the above, I sustain the Union's objections. Accordingly, I shall recommend to the Board that it set the election aside and direct a new election at an appropriate time and place.

REMEDY

Having found the Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease-and-desist therefrom and to take certain affirmative action necessary to effectuate the purposes and policies of the Act including the posting of a remedial notice consistent with the Board's recent modifications to its standard remedies in *Indian Hills Care Center*, 321 NLRB 144 (1996).

CONCLUSIONS OF LAW

On the basis of the above findings of fact and the record as a whole, I make the following

1. Menlo Food Corporation is and has been at all relevant times an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by:

(a) Interrogating employees about their union activities.

(b) Threatening employees with unspecified reprisals because of their union activities.

(c) Soliciting employees to surveil other employees' union activities.

(d) Soliciting employees' grievances with the implied promise that those grievances would be remedied without the employees needing to select the Union to represent them.

4. The above unfair labor practices constitute unfair labor practices effecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent did not otherwise violate the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER

The Respondent, Menlo Foods Corporation, East Palo Alto, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities.

(b) Threatening employees with unspecified reprisals because of their union activities.

(c) Soliciting employees to surveil other employees' union activities.

(d) Soliciting employees' grievances with the implied promise that those grievances would be remedied without the employees needing to select the Union to represent them.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its East Palo Alto, California facility copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director, in English and such other languages as the Regional Director determines are necessary to fully communicate with employees, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure the notices are not altered, defaced, or covered by other material. In the event that, during the pendancy of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time during or after September 1997.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

RECOMMENDATIONS RESPECTING OBJECTIONS

I recommend that the Petitioner's objections to election numbers 2, 3, 6, and 7, and each of them, be sustained. It is further recommended that the Board set aside the election of November 12, 1997, and direct a new election, as appropriate.

[12] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees about their union activities and sentiments.

WE WILL NOT solicit employees to surveil other employees' union activities.

WE WILL NOT threaten employees with unspecified reprisals because of their union activities.

WE WILL NOT solicit employees' grievances with the implied promise that those grievances would be remedied without the employees needing to select the Union to represent them.

WE WILL NOT in any like or related manner violate the National Labor Relations Act.

MENLO FOODS CORPORATION